Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *T. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 370

Tribunal File Number: AD-15-1300

BETWEEN:

T. M.

Applicant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: September 19, 2016

REASONS AND DECISION

OVERVIEW

[1] This matter returns from the Federal Court of Canada. Camp J. allowed the Applicant's application for judicial review and ordered that the application for leave to appeal be heard by a different panel of the Social Security Tribunal (the "Tribunal").

[2] The General Division issued a decision on July 4, 2014. It had determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that her disability was not "severe" on or before the end of her minimum qualifying period of December 31, 2013. The Applicant filed an application requesting leave to appeal on February 16, 2015, on the basis of several grounds of appeal. She acknowledges that the application is late.

ISSUES

[3] The two issues before me are as follows:

(1) should I exercise my discretion and extend the time for filing the leave application, and

(2) does the appeal have a reasonable chance of success?

FACTUAL BACKGROUND

[4] The relevant facts for the purposes of this application are as follows:

- The General Division rendered its decision on July 4, 2014. The Tribunal mailed a copy of the General Division's decision to the parties by letter dated July 9, 2014. The Federal Court indicated that a copy of the letter bore the receipt stamp of the Applicant's counsel showing that it had been received on October 27, 2014. I have not been provided with a copy of this letter which bears the receipt stamp.

- The Applicant's counsel wrote to the Tribunal on October 3, 2014, advising that it had been seven months since the hearing before the General Division, and that he had yet to receive its decision. He enquired as to when he could receive a copy of the decision.

- The Tribunal contacted the Applicant's counsel by telephone on October 16, 2014, confirming that a copy of the General Division's decision would be mailed.

- The Tribunal re-sent a copy of the decision to the Applicant's counsel, by letter dated November 17, 2014.

- The Federal Court also referred to e-mail correspondence dated December 12, 2014 and February 3, 2015 from the Applicant's spouse to their Member of Parliament. I do not have a copy of this e-mail correspondence, but the Applicant's spouse indicated that the decision of the General Division had been received on October 27, 2014.

- On February 9, 2015, an employee from the office of the Applicant's Member of Parliament contacted the Tribunal by telephone, seeking information on how to appeal the decision of the General Division.

- On February 16, 2015, the Applicant filed an application requesting leave to appeal (AD1). She indicated that she had received the General Division decision on October 27, 2014. She explained that she was late in filing the application for leave to appeal because of medical and legal concerns. She also provided submissions on the merits of her appeal.

- By letter dated February 20, 2015, the Tribunal acknowledged receipt of the application requesting leave to appeal. The Tribunal informed the Applicant that a Tribunal member would review the matter to determine whether an extension of time should be allowed for filing the appeal. The Tribunal also informed the Applicant that it had the authority to extend the appeal period

"under certain circumstances" but in no case could an extension be granted if more than one year had passed since she had received the decision from the General Division.

- On February 20, 2015, the Applicant filed supporting documentation from her family physician, who explained that it had been a priority for her to stabilize the Applicant's health. The Applicant had moved from Halifax to the Ottawa area in August 2014 and the stress had exacerbated her fibromyalgia (AD1A).

ANALYSIS

(a) Late application

[5] Paragraph 57(1)(b) of the *Department of Employment and Social Development Act* requires that an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision was communicated to an appellant.

[6] In this case, the incontrovertible evidence before me is that the decision of the General Division had been communicated to the Applicant by at least October 27, 2014. The Applicant concedes that the 90-day filing window expired in late January 2015 and that approximately three weeks had passed before she filed her leave application.

[7] There is no entitlement as of right to an extension. In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 833, the Federal Court set out the four factors which should be considered in determining whether to extend the time period beyond 90 days within which an applicant is required to file his or her application for leave to appeal. They include whether: an applicant held a continuing intention to pursue the application or appeal; the matter discloses an arguable case; there is a reasonable explanation for the delay; and there is no prejudice to the other party in allowing the extension. In *Canada (Attorney General) v. Larkman,* 2012 FCA 204 (CanLII), the Federal Court of Appeal held that the overriding consideration is that the interests of justice be served, but it also held that not all of the four questions relevant to the exercise of discretion to allow an extension of time need to be resolved in an applicant's favour. It is clear from

Larkman that the enquiry into the interests of justice is not confined to the four *Gattellaro* factors and that other considerations can be taken into account.

[8] There is no prejudice to the Respondent in allowing an extension, given the relatively short delay involved. The Applicant explains that she was preoccupied with her health, as her medical condition had been aggravated after she had moved from Halifax to Ottawa. Her family physician confirmed that she was focused on stabilizing the Applicant's symptoms of fibromyalgia (AD1A). The Applicant also explains that she sought legal assistance and advice as to how to proceed with the appeal. I am satisfied that the Applicant demonstrated a continuing intention to pursue her appeal and that there is a reasonable explanation to account for her delay in filing the leave application.

[9] I have not considered whether the matter discloses an arguable case in the context of whether I ought to extend the time for filing, but it is well established that an applicant need not satisfy all four factors set out in *Gattellaro*, or that all four factors be assigned equal weight, given that the overriding consideration remains the interests of justice. In the interests of justice and the factual circumstances of this case, I am prepared to extend the time for filing the leave application and consider the issue of whether there is an arguable case in the context of the leave application.

(b) Application requesting leave to appeal

[10] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

(a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[11] Before leave can be granted, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

i. Natural justice

[12] The Applicant submits that the General Division failed to observe a principle of natural justice, as it did not provide her with sufficient time to prepare for the proceedings, nor provide any guidance regarding the appeals process. The Applicant, however, did not indicate what additional time she required for preparation, or how any additional time could have helped in her preparation. The Applicant argues that, due to uncertainty regarding the new process and time constraints, she and her counsel were unable to arrange to have her treating family physician testify at the hearing. The Applicant also claims that the General Division did not provide her spouse with an opportunity to give evidence. They had expected that he would be permitted to give evidence regarding the severity of the Applicant's symptoms. Finally, the Applicant contends that an in-person hearing was more appropriate than a teleconference.

[13] I find no merit to the submissions that there was insufficient time to prepare for the proceedings. The Applicant was represented by legal counsel. He filed a Notice of Readiness on November 20, 2013, along with supporting documentation, indicating that the Applicant was ready to proceed. He prepared submissions which set out the Applicant's background and circumstances. He also reviewed the medical evidence and the legal authorities. There was extensive documentation before the General Division, spanning several hundreds of pages. There were several expert opinions, including a functional capacity evaluation, filed with the Tribunal. The Applicant and her counsel appeared prepared; indeed, the Applicant was able to readily respond to questions posed to her by her counsel, the Respondent's representative and the General Division member. Further, her counsel was able to provide closing submissions. There is no evidence before me that either the Applicant or her counsel had ever protested that there was insufficient time to prepare

for the proceedings, nor any evidence that they had sought an adjournment of the proceedings at any time, either with the Tribunal or with the General Division member.

[14] As for the newness of the appeals procedures, neither the DESDA nor the *Social Security Tribunal Regulations* (Regulations) establishes any rules of procedures for the hearing of appeals. Generally, administrative tribunals are considered masters in their own house. As the Federal Court held in *Canada (Human Rights Commission) v. Canada Post Corp.*, [2004] 2 FCR 581, 2004 FC 81, "In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, with the exercise judicial or quasi-judicial functions, the rules of natural justice".

[15] The hearing proceeded on March 4, 2014. The audio recording of the hearing indicates that, at the outset of the hearing, the General Division member fully explained the process and procedures that she would be following (approximately 7:00 to 13:51 of the audio recording). The member's comments were largely directed to the Applicant. The member confirmed that two hours was scheduled for hearing. She also described the format that the hearing would follow. The member also set out the documentary evidence before her, and finally, specifically asked the Applicant whether she had "any questions concerning the procedure up to that point". The Applicant responded that she did not. I am not satisfied that the General Division failed to provide any guidance regarding the appeals process.

[16] The Applicant submits that the process was also unfair as there was inadequate opportunity to arrange to have a witness attend the hearing. The General Division member indicated in her introductory remarks that the Tribunal had received notification that the Applicant's family physician was possibly going to be present as well. The Applicant's counsel responded that the Applicant had intended that the family physician would be present but unfortunately she was sick that day and had been off work for the past two days and "unfortunately we won't be able to have her present ". The General Division member indicated that the Tribunal had the family physician's medical reports (5:57 of audio recording).

[17] The Applicant's response regarding the family physician belies any submission that there had been insufficient time to arrange to have the family physician attend the hearing. The family physician was unable to attend the hearing apparently for reasons of sickness. I find this unrelated to the appeals processes or procedures. It was open to the Applicant to seek an adjournment of the proceedings, had she required the family physician attend the hearing, but one was not sought.

[18] The Applicant's spouse was present during the hearing. The Applicant's counsel introduced him at the outset. The Applicant now alleges that the General Division did not provide her spouse with an opportunity to give evidence.

[19] However, the General Division member enquired as to whether the Applicant's husband would be "acting as a witness or just there for moral support" (5:35 of audio recording). The Applicant's counsel responded that the husband was there for "moral support for the most part unless [the General Division member] ha[s] any questions directed towards him of course". The only evidence the Applicant's counsel sought to elicit from the Applicant's spouse related to his own employment. At that point, the General Division member suggested that the Applicant could testify as to what her husband did during the day. The Applicant's counsel responded that he did not have any difficulty with this (1:08:19). The Applicant then proceeded to describe the additional household duties and responsibilities her husband had assumed since the onset of her medical issues. She also testified that when her husband is away on travel, her mother or mother-in-law will assume these household duties.

[20] At no time did the Applicant nor her counsel endeavour to adduce evidence from the Applicant's spouse in regards to his observations of the Applicant. Neither the Respondent's representative nor the General Division member required him to give evidence. While the General Division could have turned to the Applicant's spouse and invited him to give evidence, there was no duty upon it to do so. It was solely the Applicant's case to present. I do not find any evidence in the audio recording that the General Division refused or declined to receive any evidence from the Applicant's spouse

on this point. Although he could have given direct evidence regarding his own employment, it does not appear that anything turns on this evidence in any event.

[21] After the Applicant's counsel completed his direct examination of the Applicant, he indicated that, "as far as questioning is concerned, I have moved through the questions that I wanted to address with [the Applicant]. I do have some closing summations, unless the panel has any questions". The General Division member invited the Respondent's representative to question the Applicant and, if any questions remained outstanding, she would pose her own questions, following which she would allow submissions from each of the parties. There were no objections voiced to this approach. The Respondent's representative proceeded to ask questions of the Applicant (up to 1:21:45) after which, the General Division member asked questions (up to 1:27:20).

[22] After completing her questions, the General Division member asked the Applicant's counsel whether he "would like to summarize". The Applicant's counsel provided submissions (up to 1:39:27), as did the Respondent's representative (up to 1:44:08). Following this, the General Division member turned to the Applicant and invited her to make any remarks. The Applicant stated that she "wanted to have [her] life back the way it was" as "there is a big part of [her] life missing right now"(up to 1:45:45). The General Division member then made concluding remarks.

[23] I do not see any evidence where the General Division barred the Applicant from making her case, or that the Applicant sought an adjournment of the proceedings. I am not satisfied that the General Division failed to provide the Applicant's spouse with an opportunity to give evidence, particularly when he was not presented for that purpose, or that there was an insufficient opportunity to arrange to have the family physician give evidence. At no time during the hearing were there any procedural objections.

[24] Finally, the Applicant contends that an in-person hearing was more appropriate than a teleconference, as it would have "provided necessary context for accurate interpretation of the facts". She claims that a "complex condition like fibromyalgia with several sources of information on treatments and severity of symptoms, is difficult to convey accurately through a teleconference and written submission". I do not see how a

teleconference precluded the Applicant from accurately conveying the impact of the symptoms on her, or the Applicant's counsel from making submissions regarding any of the evidence.

[25] I do not have any evidence that the Applicant ever requested a particular form of hearing. Section 21 of the *Regulations* permits the Tribunal to decide on the form of hearing. The Tribunal notified the parties by letter dated February 6, 2014 that the appeal would proceed by way of teleconference. Neither party made any submissions as to the appropriateness of the form of hearing. For that matter, neither party objected to the hearing proceeding by teleconference at any time following the issuance of the notice of hearing. Any objections to the form of hearing should have been made at the earliest possible opportunity. I am not satisfied that the form of hearing chosen by the General Division member deprived the Applicant a fair hearing or any opportunity to fairly present her case.

ii. *Villani* and *E.J.B.*

[26] The Applicant submits that the General Division failed to apply the principles set out in *Villani v. Canada (Attorney General)*, 2001 FCA 248, in that it did not consider the Applicant's particular circumstances such as her age, training and prior work experience and her employability in the "real world context".

[27] The General Division indicated at paragraph 24 of its analysis that it was guided by the principles set out in *Villani*. In the same paragraph, it also wrote, that, "[i]n this case, the Appellant is young, well-educated and would have many transferrable skills to apply to another position". Hence, it cannot be said that the General Division failed to consider the Applicant's particular circumstances. I am mindful that the Federal Court of Appeal has cautioned against interfering with a trier of fact's assessment of an applicant's personal circumstances: *Villani*, at paragraph 49. I see no basis to interfere with that assessment.

[28] The Applicant further submits that the General Division failed to apply the principles set out in *E.J.B. v. Canada (Attorney General)*, 2011 FCA 47, in that it considered only the Applicant's main disabling physical condition, instead of her entire condition.

[29] The General Division relied on the opinions of a pain management specialist and an occupational therapist in determining that the Applicant exhibited some capacity. The Applicant argues that the General Division erred when it analyzed the pain management specialist's report and the functional capacity evaluation, particularly the latter, as it focussed on her physical impairments, "without due regard" for her mental impairments. She maintains that the physical and mental impairments are cumulative and must be considered together in assessing the severity of her disability. The General Division referred to excerpts of these two reports, at paragraphs 14 and 15 of its decision.

[30] The occupational therapist stated that the purpose of the functional capacity evaluation was to determine the Applicant's functional abilities and limiting factors. It is clear from the testing that the evaluation was limited to testing the Applicant's physical capacities such as postural tolerance, body strength and general (physical) function (GT1-593 to GT1-614). Similarly, the pain management specialist also restricted the scope of his assessment to the Applicant's physical capacities, as the assessment of her mental fitness lay outside his expertise (GT1-562 to GT1-578).

[31] However, the General Division did not limit its scope of analysis to the two reports. The General Division also examined the Applicant's mental health issues, which it found stemmed from fibromyalgia. The General Division noted that the Applicant "continues to see different mental health professionals, but none of them indicate that her symptoms would prevent her from working in any capacity" (paragraph 27). Clearly, the General Division examined each of the different reports from the mental health professionals and considered the Applicant's mental health issues. Hence, it cannot be said that the General Division failed to consider the totality of the Applicant's disabilities on a cumulative basis, or that it failed to consider her mental health issues in a "real world context".

iii. Erroneous findings of fact

[32] The Applicant alleges that the General Division based its decision on several erroneous findings of fact:

a) at paragraph 25, that she had not attempted to return to work either at her former position or at another teaching position with modified duties. In this regard, the Applicant points to the fact that she had returned to a modified work schedule and ergonomic accommodations from March to May 2010, and again from August 2010 to January 2011.

The General Division set out the evidence regarding her employment history and work attempts at paragraph 10. The General Division wrote that the Applicant "stopped for good at the end of the 2009/2001 school year" and that she "made no attempts to return to work after June 2010, nor did she apply for jobs in any other field".

The General Division found that the Applicant had made no attempts to return work either at her former position or at another teaching position with modified duties, presumably after June 2010. Support for this finding can be found in the Questionnaire accompanying the Application for a disability pension (GT1-539), where the Applicant disclosed that she last worked on June 16, 2010. The Applicant indicated that she had completed the Questionnaire on June 15, 2011 (GT1-545). Her counsel confirmed this in his written submissions of June 21, 2013, in which he wrote that the Applicant had tried a gradual return to work but went off permanently in June 2010 and has not been able to return to work (GT1-554). And, under cross-examination, the Applicant testified that she had not attempted to perform "any other type of work besides [her] own teaching work", nor put out any resumes or looked at applying for any type of job (1:16:03 of audio recording). I could not locate any evidence before the General Division that she had worked again after June 2010. Hence, I am not satisfied that the General Division made an erroneous finding of fact on this point.

b) at paragraph 26, that apart from sleeping aids, she was not taking any pain relief medication (at the hearing date). The Applicant contends that she had been prescribed Amitriptyline for pain since mid-2010. She referred to the

MSI medical patient history as well as the rheumatologist's clinical note of June 6, 2011 (GT1-282, GT1-330 and GT1-331/GT1-438 to GT1- 439).

A review of the hearing file indicates that the Applicant had been prescribed several other medications in 2009 (GT1-332, GT1-336 and GT1-429) and Cymbalta in 2010 (GT1-480). However, none of these were for pain relief.

It is clear from the decision that the General Division was aware that the Applicant had been taking other medications. This is noted at paragraph 12 of the evidence section, where the General Division wrote that the Applicant was taking Fluoxetine 10 mg, an anti-depressant, twice a day and Lyrica 75 mg (at the hearing, she testified that she was no longer taking Lyrica).

The family physician's report of August 15, 2011 (GT1-423) indicates that the Amitriptyline was helpful for pain. The physician also noted that the Applicant began taking Lyrica in May 2010 and found that it helped somewhat with pain. The Applicant had also tried Naprosyn but did not see any significant improvement. She reported to a psychiatrist in December 2011 that she was no longer taking Lyrica as it was unhelpful (GT1-468/GT1-503).

More recently, the medical report of July 30, 2012 prepared by a pain management specialist, and the functional capacity evaluation of August 2012, both indicate that the Applicant was taking amitriptyline 25 mg at night, fluoxetine one tablet twice daily and occasional Advil (GT1-564 to GT1-565 and GT1-596). Fluoxetine typically is used as an antidepressant.

Medical reports confirm or suggest that the Amitriptyline was intended as a sleeping aid: June 22, 2010 entry in clinical records (GT1-512); psychiatrist's report of December 6, 2010 (GT1-470) and December 2, 2011 (GT1-468/503); and October 21, 2011 entry in clinical records (GT1- 520).

As well, the Applicant testified at the hearing that currently she was taking Amitriptyline 25 mg and Fluoxetine (51:10 to 51:19 and 1:17:47). Given

these considerations, there was an evidentiary basis to support the General Division's findings that the Applicant was not being prescribed anything at that time for her pain, as the Amitriptyline was largely being used for her sleep.

c) at paragraph 26, that apart from the opinion of Dr. Natarajan, there is no other medical evidence that supports the statement that the Applicant is unable to work in a full-time capacity. The Applicant argues that "there is ample evidence that supports the finding that [the Applicant] cannot work in a full time capacity. Specifically, the net effect of the physical impairments mentioned by Dr. Bond and contained in the Functional capacity report and the mental impairments described by Dr. Bains, Dr. Jefferson, and Dr. Natarajan in her patient notes and summary letters". She maintains that failing to consider *Villani* and *E.J.B.* in this situation represents errors of law.

The General Division wrote:

> Only Dr. Natarajan, who supports her disability application, states that she would not be able to perform the duties of her job, but she qualifies this as an inability to work in a full time capacity. However there is no other medical evidence that supports this statement.

In fact, the General Division concluded that the family physician was of the opinion that the Applicant is unable to perform the duties of her job – rather than any job - on a full-time capacity. The General Division was very careful to point out that the family physician had qualified her opinion.

The Applicant's submissions essentially call for a reassessment. As the Federal Court held in *Tracey*, it is not appropriate for the Appeal Division, in determining whether leave should be granted or denied, to reassess the evidence or reweigh the factors considered by the General Division. Neither the leave, nor the appeal, provides opportunities to re-litigate or re- prosecute the claim. I am therefore not satisfied that the appeal has a reasonable chance of success. It is not appropriate that I conduct a reassessment of the evidence.

d) at paragraph 27, in finding that the Applicant's symptoms have improved since her initial diagnosis. The Applicant contends that this finding fails to consider why the Applicant improved. The Applicant explains that she improved because her spouse and others assumed the household and child care duties, leaving her to focus on her own health.

Even if this evidence had been before the General Division, I do not find it to be of particular relevance to the issue as to whether the Applicant is incapable regularly of pursuing any substantially gainful occupation.

CONCLUSION

[33] Given the considerations above, the application for leave to appeal is dismissed.

Janet Lew
Member, Appeal Division